[HIGH COURT OF AUSTRALIA.]

LIPPE . . . . . APPELLANT;
CAVEATOR,

AND

HEDDERWICK . . . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1922.

MELBOURNE, *Oct.* 24.

Knox C.J., Powers and Starke JJ.

Will—Revocation—Lost will—Presumption of destruction—Intention to revoke—Ineffectual new will—Costs of opposing probate—Wills Act 1915 (*Vict.*) (*No.* 2749), *sec.* 18.

A testatrix, having duly executed a will and given it to her solicitor, about three months afterwards signed a document, in the form of a will and purporting to revoke all other testamentary dispositions, in the presence of one witness, who also signed it, and on the same day she wrote to her solicitor asking him to send her will to her as she wanted to look it over and make some alterations. On the next day a second person signed the document above referred to in her presence as a witness. A few days afterwards the original will was received by the testatrix from her solicitor, and she sent to him the other document with a letter describing it as a "new will." Shortly afterwards she died. The original will could not be found among the effects of the testatrix.

Held, that the proper inference from the facts was that the testatrix had destroyed her original will, not with the intention of revoking it, but in the belief that she had already revoked it by the supposed new will, and therefore that, as that supposed new will was not duly executed, probate was properly granted of a draft of the original will.

Benson v. *Benson*, (1870) L.R. 2 P. & D., 172, and *Perrott* v. *Perrott*, (1811) 14 East, 423, followed.

An application for probate of the original will was opposed by the testatrix's husband, who received no benefit under it or under the supposed new will. The trial Judge granted the application, and ordered the husband to pay the costs occasioned by his opposition. On appeal to the High Court,

Held, that, as the cause of the litigation was due to the fault of the testatrix, which justified the husband in putting the executor to proof of the will, he should have been allowed his costs out of the estate, and that in such circumstances the High Court would review the exercise by the trial Judge of his discretion.

McCauley v. *McCauley*, (1910) 10 C.L.R., 434, applied.

Decision of the Supreme Court of Victoria (*Irvine* C.J.) varied.

APPEAL from the Supreme Court of Victoria.

On 13th February 1921 Isabel Lippe, a married woman whose husband, John Nicholson Lippe, was living apart from her, duly executed a will by which she appointed Mr. Bruce Pitcairn Hedderwick, a member of the firm of solicitors who acted for her, to be her executor. No benefit was given to her husband by the will. The will was left by Mrs. Lippe with her solicitor. On or before 31st May 1921 Mrs. Lippe prepared or caused to be prepared a document, in the form of a will, purporting to revoke all other testamentary dispositions and to leave all her property to one Charles Ernest Macalister Smith, and on that day she signed the document in the presence of a witness, who also signed it. On the same day she wrote to Mr. Hedderwick asking him to send her will to her as she wanted to look it over and make some alterations. On the morning of 1st June 1921 a second person signed the document above referred to in her presence as a witness. On the same day Mrs. Lippe's solicitors posted to her her will, which was delivered to her about 7th June. On 9th June Mrs. Lippe sent to Mr. Hedderwick the document above referred to, enclosed in a sealed envelope endorsed "Will of Isabel Lippe," with a letter in which she said "I enclose a new will which I wish kept unopened." Shortly afterwards Mrs. Lippe went to Sydney, and met her death there on 14th June 1921. After her death Mr. Hedderwick searched for the will of 13th February 1921, but was unable to find it.

On 20th April an order *nisi* was obtained by Mr. Hedderwick

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from the Supreme Court of Victoria, calling upon John Nicholson Lippe, who had filed a caveat, to show cause why probate of a draft copy of the will of 13th February 1921 should not be granted to Mr. Hedderwick. The order *nisi* was heard by *Irvine* C.J., who made it absolute and ordered that probate of the draft will should be granted to Mr. Hedderwick, and that the costs occasioned by the filing of the caveat should be paid by John Nicholson Lippe.

From that decision Lippe now appealed to the High Court.

Hotchin, for the appellant. From the facts that the will was in the possession of the testatrix shortly before her death and that it could not be found after her death, the proper presumption is that she destroyed it with the intention of revoking it. That presumption cannot be rebutted except by very clear evidence (*Lord John Thynne* v. *Stanhope* (1); *Powell* v. *Powell* (2)). The evidence does not show that the testatrix destroyed the will because she thought she had made a new will by which the earlier will was revoked, but shows merely that she destroyed it about the time when she made a new will. [Counsel also referred to *Ward* v. *Crook* (3); *Homerton* v. *Hewett* (4); *Hyde* v. *Hyde* (5); *Limbery* v. *Mason* (6); *Onions* v. *Tyrer* (7); *Scott* v. *Scott* (8); *Re Mitcheson* (9); *In re Weston* (10).]

[KNOX C.J. referred to *Dancer* v. *Crabb* (11).]

Latham K.C. (with him *Fullagar*), for the respondent. Although from the mere destruction of a will by a testator the presumption is that he destroyed it with the intention of revoking it, if other facts are proved all must be taken into consideration before a conclusion is drawn as to his intention (*McCauley* v. *McCauley* (12)). Here the facts as a whole show that the testatrix destroyed the will not with the intention of revoking it but because she believed that

(1) (1822) 1 Add., 52.
(2) (1866) L.R. 1 P. & D., 209.
(3) (1896) 17 N.S.W.L.R. (P. & P.), 64, at p. 67.
(4) (1872) 25 L.T. (N.S.), 854.
(5) (1708) 1 Eq. Cas. Abr., 409.
(6) (1735) 2 Com., 451.
(7) (1716) 1 P. Wms., 343.
(8) (1859) 1 Sw. & Tr., 258.
(9) (1863) 32 L.J. (P. M. & A.), 202.
(10) (1869) L.R. 1 P. & D., 633.
(11) (1873) L.R. 3 P. & D., 98.
(12) (1910) 10 C.L.R., 434.

she had made a new will and that the old will was rendered useless (see *Giles* v. *Warren* (1)).

[STARKE J. referred to *Perrott* v. *Perrott* (2).]

When the testatrix received the old will from her solicitors she believed that it had already been revoked; and therefore, when she afterwards destroyed it, she could not have had an intention to revoke it. [Counsel also referred to *Beardsley* v. *Lacey* (3); *Clarkson* v. *Clarkson* (4); *Dancer* v. *Crabb* (5); *Powell* v. *Powell* (6).]

Hotchin, in reply. The appellant should have had his costs of opposing the grant of probate (*Spiers* v. *English* (7)).

KNOX C.J. The relevant facts of this case are these:—In the month of February 1921 Mrs. Lippe duly executed a will which was left with her solicitors, Messrs. Hedderwick, Fookes & Alston—Mr. Bruce Pitcairn Hedderwick, the respondent to this appeal, being the executor of that will. Some time in the month of May 1921 she prepared or caused to be prepared a document in the form of a will, and that document, amongst other things, purported to revoke all other testamentary dispositions. On 31st May Mrs. Lippe signed that document in the presence of one witness, who also signed. On the same day she wrote to her solicitors a letter in the following terms: "Please send my will up to me as I want to look it over and make some alterations." On the morning of 1st June a second person signed the document above referred to in her presence as a witness. On the same day Mr. Hedderwick posted to her the will which he had been asked to send. About 7th June that will was delivered to Mrs. Lippe by the post office. On 9th June she sent the supposed new will to Mr. Hedderwick, with a letter in which she said: "I enclose a new will which I wish kept unopened." A day or two afterwards she went to Sydney, and met her death there on 14th June.

The document which was described as a new will was not properly executed as a will, and could not be admitted to probate. After

(1) (1872) L.R. 2 P. & D., 401.
(2) (1811) 14 East, 423.
(3) (1897) 78 L.T., 25.
(4) (1862) 2 Sw. & Tr., 497.
(5) (1873) L.R. 3 P. & D., at p. 104.
(6) (1866) L.R. 1 P. & D., at p. 212.
(7) (1907) P., 122.

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her death search was made among her effects but no trace could be found of the will of February 1921 which had been sent to her. In these circumstances application was made for probate of the draft of that will, and the Supreme Court ordered probate to issue. The application for probate was opposed by the husband of the testatrix, who contended that she died intestate, the new will being informal and the will of February having been, as he contended, revoked. To establish revocation of the will of February the appellant offered proof that the will of February had been traced to the possession of the testatrix on 7th June and could not be found among her effects after her death, and contended that on proof of these facts it was to be presumed that Mrs. Lippe had destroyed the will with the intention of revoking it within the meaning of sec. 18 (4) of the *Wills Act* 1915. It is quite clear from the evidence, especially the letter of 9th June 1921 from the testatrix to her solicitors, that she was under the impression, at any rate after the second witness had put his signature to the supposed new will on 1st June, that that document was a valid testamentary disposition, and knowing, as she must have known, what it contained, she must have believed that by the execution of that document her previous will had been revoked. It is clear also that the will of February, assuming it to have been destroyed by her, must have been destroyed after 7th June, the day on which she received it from the post office. In these circumstances I think that the proper inference to draw is that she destroyed that will, not for the purpose of revoking it but in the belief that she had, by the supposed will signed by her on 31st May, already revoked it and that the earlier will was then of no effect whatever. The question then is whether in these circumstances probate ought to have been granted of the will of February 1921.

In *Benson* v. *Benson* (1) Lord *Penzance* said :—"There is a principle with regard to questions of revocation upon which the Court always acts, and which is, I think, strongly applicable to this case. It is this, that when a will is once proved to have been duly executed, the Court must be satisfied that it has been revoked before pronouncing against it. In many cases it has happened

(1) (1870) L.R. 2 P. & D., 172, at p. 176.

that a will in a testator's custody has been found, after his death, obliterated in such a way as to amount to a revocation if he was of sane mind when he did it, and there has been no evidence whether it was done before or after he became insane. Does the Court, in the absence of proof, presume that it was done before he became insane, when it would amount to a revocation, or when he became insane, when it would not amount to a revocation ? The answer is, that the Court always refuses to presume one way or the other, but holds that the party who alleges that it was done at a time when it would amount to a revocation must prove his allegation, and in the absence of proof the revocation falls to the ground. In *Harris* v. *Berrell* (1) Sir *C. Cresswell* said :—'By 1 Vict. c. 26, every will is required to be executed as therein prescribed. If it is once proved that a will has been duly executed, I hold that it is entitled to probate unless it is also shown that it has been revoked by one of the several modes pointed out by that statute. I am of opinion that the burden of showing that it has been so revoked lies upon the party who sets up the revocation.' " Applying that statement of law to the present case, it is quite clear, in fact it is admitted, that the will of February 1921 was duly executed. It is quite clear that it was not revoked by the execution of the later document, because that was ineffective as a will. The ground of revocation set up is that the will of February was destroyed by the testatrix. But destruction is a ground of revocation only if it is done *animo revocandi*. In my opinion the proper inference to be drawn from the facts negatives the proposition that this will, presuming it to have been destroyed, was destroyed with the intention of revoking it. I do not regard this as a case of dependent relative revocation. It seems to me rather to fall within the line of cases dealing with destruction or obliteration of an existing will under a mistake of law or of fact, or of law and fact combined. In *Perrott* v. *Perrott* (2), a case before the *Wills Act*, Lord *Ellenborough* said :—" That cancellation is an equivocal act, and of no effect unless there be the *animus cancellandi*, is clear from the cases cited in the argument, of *Burtenshaw* v. *Gilbert* (3) ; and from *Hyde* v. *Hyde* (4) : and it is evident, from the

(1) (1858) 1 Sw. & Tr., 153, at p. 154.
(2) (1811) 14 East, at p. 439.
(3) (1774) 1 Cowp., 49.
(4) (1708) 3 Rep. Ch., 83 ; 1 Eq. Cas. Abr., 409.

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declaration which accompanied the act of cancelling the deed, that it was cancelled upon the supposition that the will would operate as an appointment, and that the money which the deed had directed to be raised would be demandable under the will. Now this was a mistake: the will contains no direction for raising the money, but acts entirely upon the supposition that the deed would continue in force, and that the money would be raised under such deed. This then raises the question, whether such a mistake, clearly evidenced by what passed at the time of cancellation, annuls the cancellation, and entitles us to act as if the *animus cancellandi* or *revocandi* were altogether wanting: and we are of opinion that it does. Mrs. Territ mistook either the contents of her will, which would be a mistake in fact; or its legal operation, which would be a mistake in law; and in either case we think the mistake annulled the cancellation. *Onions* v. *Tyrer* (1) is a strong authority that a mistake in point of law may destroy the effect of a cancellation." The decision in *Perrott* v. *Perrott* (2) has been followed in *Beardsley* v. *Lacey* (3).

I think the appellant has failed to establish that Mrs. Lippe destroyed the will of February 1921 *animo revocandi*; and destruction without intention to revoke is not in itself an effective revocation of a will, having regard to the provisions of the *Wills Act*.

There is one other point—the question of costs. On that I think that the order of the learned Chief Justice should be varied. I feel little doubt that if the matter had been brought to his notice he would not have ordered the present appellant to pay the costs in the Supreme Court. The whole trouble arose through the acts or omissions of the testatrix. This is a case in which the present appellant was, I think, justified in putting the propounder of the will of February 1921 to strict proof of it and in contesting his right to probate of it. I think that this case comes within the rule applied in *Orton* v. *Smith* (4) and *Spiers* v. *English* (5), cited by Mr. *Hotchin*, and that the appellant ought to have been allowed out of the estate his costs in the Supreme Court. But the fact that he was entitled to contest

(1) (1716) 1 P. Wms., 343; 2 Vern., 742.
(2) (1811) 14 East, 423.
(3) (1897) 78 L.T., 25.
(4) (1873) L.R. 3 P. & D., 23.
(5) (1907) P., 122.

the will at the expense of the estate in the Supreme Court does not afford any justification for an appeal by him to this Court. The order should be that the appellant be allowed out of the estate his costs in the Supreme Court, and that he pay the costs of this appeal; and that the costs payable by and to him be set off one against the other, the balance to be paid by or to him as the case may be.

POWERS J. I agree with the judgment which has just been given by the Chief Justice, and for the reasons stated by him.

STARKE J. The question in this case is one of fact: Was the will of February 1921 destroyed by the testatrix with the intention of revoking it or was it destroyed by the testatrix under the mistaken notion that she had completed another will when she, in truth, had not? The facts, owing to the nature of the case, are in a very narrow compass and not, I think, by any means as clear as in other cases in which the same question has come before the Courts. But the better view on the evidence appears to me to be that the will of February 1921 was destroyed by the testatrix under the mistaken notion that she had made another will, when in fact and in law she had not. Destruction of a will in these circumstances is ineffective.

As to costs, I will add that we are not departing in this case from the practice laid down in *McCauley* v. *McCauley* (1), that the High Court will not interfere with an order as to costs of a probate matter which are in the discretion of the Judge in the absence of error in principle or some misapprehension in fact on the part of the Judge. But in this case the cause of the litigation was really due to the acts of the testatrix, which reasonably required investigation.

Primâ facie, in such circumstances, I would say that a caveator should have his costs out of the estate, and I attribute the order of the learned Chief Justice to the fault of the caveator in not having brought to his attention these circumstances and the cases which warrant costs out of the estate in such circumstances. The learned counsel who appeared before us all admitted that the question of costs was not brought to the attention of the Chief Justice. Therefore I think the Chief Justice probably had not in his mind the

(1) (1910) 10 C.L.R., 434.

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practice I have mentioned and that, if his attention had been drawn to it, he would have made the order as to costs which we now make.

Order of Supreme Court varied by ordering that the costs of the appellant in the Supreme Court be paid out of the estate. Otherwise appeal dismissed. Appellant to pay costs of this appeal. Set-off of costs.

Solicitors for the appellant, *Madden, Drake & Candy.*

Solicitors for the respondent, *Hedderwick, Fookes & Alston.*

B. L.

Cons *Stamp Duties, Chief Commissioner of* v *Buckle* (1998) 72 ALJR 243

Cons *Fawthrop & Repatriation Commission, Re* (1994) 36 ALD 140

Appl *Bradney Pty Ltd & Comr of State Revenue (Vic), Re* (1996) 33 ATR 1087

Cons *Hay* v *Hay* (1998) 23 FamLR 247

Cons *CSD (NSW)* v *Buckle* (1998) 192 CLR 226

[HIGH COURT OF AUSTRALIA.]

WALLACE AND OTHERS . . . . . APPELLANTS;
DEFENDANTS,

AND

LOVE AND OTHERS . . . . . RESPONDENTS.
PLAINTIFFS AND DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1922.

SYDNEY, *Sept.* 12, 13.

MELBOURNE. *Oct.* 13.

KNOX C.J., HIGGINS and STARKE JJ.

Will—Construction—Gift of annuities—No distribution until estate free from annuities—Appropriation to assure annuities—Right of trustees to distribute before death of annuitants—Bequests of shares in company—Advancement of legatees—Agreement for hotchpot of shares—Hotchpot of dividends—"Encumbrances"—Secured and unsecured debts.

A testator, having by his will given all his property to trustees upon certain trusts including a trust to pay certain annuities, expressly declared that until his estate was free from (*inter alia*) the annuities there should be no division